LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 28 1970
E. ROBERT SEAVER, CLERK

NO. 768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners,

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN
and WILLIAM D. TREEBY
Stone, Pigman, Walther,
Wittmann & Hutchinson
1209 Whitney Bank Building
New Orleans, Louisiana 70130

Attorneys for Columbia Pictures Corporation, Metro - Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corp., Petitioners.

BERNARD G. SEGAL and
EDWARD W. MULLINIX
Schnader, Harrison, Segal
& Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102
LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin,
Krim & Ballon
477 Madison Avenue
New York, New York 10022
GIBBONS BURKE
Chaffe, McCall, Phillips, Burke,
Toler & Sarpy
National Bank of Commerce
Building
New Orleans Louisiana 70112
Attorneys for National Screen
Service Corporation, Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Statutes Involved	2
Statement of the Case	2
Reasons for granting the Writ:	10
I. The Question Involved Is Important To The Administration of Justice	10
II. The Decision Below Conflicts With Prior Decisions By This Court and Decisions By Other Courts Of Appeals	12
A. The Motion for Summary Judgment Required Respondent to Assert Any "New Actions."	12
B. A New Damage Period Does Not Create a New Cause of Action	13
Conclusion	18

INDEX (Continued)

Page

Appendix:

District Court Order Granting Motion for Summary Judgment 19

District Court Order Amending Minute Entry of June 21, 1968 21

District Court Summary Judgment 23

District Court Order Amending Minute Entry of June 21, 1968 26

Court of Appeals Judgment 27

Court of Appeals Opinion 28

Court of Appeals Order Denying Rehearing 44

CITATIONS

Cases: Page

Baldwin v. Iowa State Traveling Men's Association 283 U.S. 522, 525-526 (1931) 10, 11

Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927) 10

Cream Top Creamery v. Dean Milk Co., 383 F.2d 359 (6th Cir. 1967) 17

Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964) 15, 17

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 11145, E.D. La., filed May 17, 1961 9

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 15125, E.D. La., filed November 30, 1964 9

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 67-1160, E.D. La., filed August 11, 1967 9

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 421 F.2d 1313 (5th Cir. 1970) 9

Flora v. United States, 357 U.S. 63 (1958) 17

Floralynth Laboratories v. Goldberg, 191 F.2d 877 (1951) 17

Page

Lawlor v. Honorable United States Court of Appeals for the Third Circuit, 351 U.S. 948 (1956) 8

Lawlor v. National Screen Service Corporation, 211 F.2d 934 (3rd Cir. 1954), rev'd, 349 U.S. 322 (1955) 8, 14, 15, 16, 17

Lawlor v. National Screen Service Corporation, 238 F.2d 59 (3rd Cir. 1956), vacated, 352 U.S. 922 (1957) 8

Lawlor v. National Screen Service Corporation, 270 F.2d 146 (3rd Cir. 1959), cert. denied, 362 U.S. 922 (1960) 8

Lawlor v. National Screen Service Corporation, 350 U.S. 920 (1955) 8

Lawlor v. National Screen Service Corporation, C.A. No. 10020, E.D. Pa., filed August 18, 1949 8

Lawlor v. National Screen Service Corporation, 22707, E.D. Pa., filed June 3, 1957 8

Lawlor v. National Screen Service Corporation, 359 U.S. 951 (1959) 8

Lawlor v. National Screen Service Corporation, 349 U.S. 322 (1955) 8, 13

CITATIONS (Continued)

Page

Lipp v. National Screen Service Corporation, C.A. No. 11136, E.D. Pa., filed June 30, 1950 8

Lipp v. National Screen Service Corporation, 290 F.2d 321 (3rd Cir. 1961), cert. denied, 368 U.S. 835 (1961) 8

Miller-Davis Co. v. Premiere Electrical Construction Co., No. 374 October Term 1970 17

Mitchell v. National Screen Service Corporation, C.A. No. 11376, E.D. Pa., filed September 14, 1950 8

Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366 (1920) 10

National Screen Service Corporation v. Exhibitors Poster Exchange, Inc., 349 F.2d 891 (5th Cir. 1965) 9

National Screen Service Corporation v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962) 9

Pantzer v. Paramount Film Distributing Corp., C.A. No. 67 Civ. 1401, E.D.N.Y., filed May 7, 1965, transferred by Judge Palmieri to the Eastern District of Pennsylvania on August 25, 1965, where it was given the docket No. 38820 9

CITATIONS (Continued)

Page

Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 7665, N.D. Ga., filed July 17, 1961 9

Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 12497, N.D. Ga., filed February 26, 1969 9

Poster Exchange, Inc. v. National Screen Service Corporation, 362 F.2d 571 (5th Cir.), cert. denied, 385 U.S. 948 (1966) 9

Poster Exchange, Inc. v. National Screen Service Corporation, C.C.H. Trade Reg. Rep. § 73,305 (5th Cir., Aug. 24, 1970) 9

Poster Exchange, Inc. v. Paramount Film Distributing Corp., 340 F.2d 320 (5th Cir.), cert. denied, 381 U.S. 936 (1965) 9

Riff v. National Screen Service Corporation, C.A. No. 11597, E.D. Pa., filed November 15, 1950 ..... 8, 9

Schrader v. National Screen Service Corporation, C.A. No. 11138, E.D. Pa., filed June 30, 1950 8

Siegel v. National Screen Service Corporation, C.A. No. 11137, E.D. Pa., filed June 30, 1950 8

CITATIONS (Continued)

Page

Smith v. National Screen Service Corporation, C.A. No. 9274, W.D. Okla., filed May 8, 1961 9

Snyder v. Riddell, 252 F.2d 23 (9th Cir. 1958) 17

Straus v. American Publishers Ass'n, 201 F. 306 (2d Cir. 1912) 16

Vogelstein v. National Screen Service Corp., C.A. No. 11678, E.D. Pa., filed December 5, 1950 8

Vogelstein v. National Screen Service Corp., C.A. No. 29526, E.D. Pa., filed April 21, 1961 9

Vogelstein v. National Screen Service Corp., 310 F.2d 738 (3rd Cir. 1962), cert. denied, 374 U.S. 840 (1963) 9

Statutes and Rules:

Clayton Act §§ 4, 16 (15 U.S.C. §§ 15, 26) 5

Federal Rules of Civil Procedure, Rule 56(e) 12, 13

Federal Rules of Civil Procedure, Rule 54(b) 4

Sherman Act §§ 1, 2 4

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners,

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

National Screen Service Corporation (hereinafter "National Screen") and Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corp. (hereinafter "Producers") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 26, 1970.

OPINIONS BELOW

There was no opinion by the United States District Court for the Eastern District of Louisiana. That court's

orders granting summary judgment and the judgment confirming the orders are reprinted in the Appendix, pp. 19-26, *infra*. The Opinion of the Court of Appeals, which is reported at 421 F.2d 1313, (hereinafter "the Opinion") is also reprinted in the Appendix, p. 28, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1970,[1] and Petitioners' timely application for an en banc rehearing was denied on June 29, 1970.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review by this petition for certiorari is whether Respondent is barred from maintaining this suit by two prior adverse summary judgments in cases that Respondent and the Court of Appeals concede were factually identical with this suit except for the damage period involved.

STATUTES INVOLVED

The claim asserted by Respondent in the two prior cases and in the present case is a claim purporting to arise under the federal antitrust laws, but the question presented here does not involve interpretation or application of those laws.

STATEMENT OF THE CASE

This is the *third* of three successive treble-damage antitrust actions brought by the same motion picture

[1] Appendix, p. 27.
[2] Appendix, p. 44.

poster-renter "jobber", Exhibitors Poster Exchange, Inc., of New Orleans, against the same Producers[3] and National Screen charging all defendants with having conspired in restraint of trade and to gain a monopoly in the distribution of motion picture advertising accessories through National Screen.

Suit No. 1 — 1961

The first of the actions filed by Respondent was commenced on May 17, 1961 in the United States District Court for the Eastern District of Louisiana as Civil Action No. 11,145. This action is referred to in the Court of Appeals' Opinion and here as "Suit No. 1". The Complaint in Suit No. 1 alleged that Petitioners, since before 1947, had conspired in restraint of trade and that National Screen had an illegal monopoly in the manufacture and distribution of motion picture advertising posters and accessories in the New Orleans motion picture area, with the result that Respondent, in order to stay in business, had been forced to obtain all of its motion picture advertising posters and accessories from National Screen. The Complaint further alleged that on February 15, 1961 National Screen had given notice to Respondent that it would not continue to do business with it after May 16, 1961 and that on that date National Screen in fact stopped doing business with Respondent.

Suit No. 1 was brought against all of the Petitioners except Columbia Pictures Corporation.[4] Suit No. 1

---

[3] Except as indicated in note 4 *infra* and accompanying text.

[4] Columbia Pitcures Corporation was named in the second and third suits. RKO Radio Pictures, Inc. was also named in the second and third suits but was never served with process. Allied Artists Southern Distributing Corporation and Buena Vista Distribution Co., Inc. were named in the first suit but not in the second or third.

sought (1) a restraining order, (2) a preliminary injunction, and (3) a finding of conspiracy and $300,000 in treble damages. A temporary restraining order issued on May 17, 1961 restraining all defendants from directly or indirectly refusing to deal with Exhibitors Poster Exchange, Inc. Numerous depositions, affidavits and other exhibits were offered into the record, and testimony was taken by the Petitioners to disprove the existence of the alleged conspiracy.[5] On July 26, 1961 motions for summary judgment were filed, with supporting documentation, and judgments were granted dismissing Suit No. 1 against Producers. The District Court judgment of dismissal in Suit No. 1 contained a determination and direction for entry of final judgment under Rule 54(b) of the Federal Rules of Civil Procedure and was, therefore, final and appealable. Respondent, however, did not appeal.

Suit No. 2 — 1964

On November 30, 1964, Respondent commenced its second action (Civil Action No. 15,125) against Petioners.[6] This action is referred to as "Suit No.2" here and in the Court of Appeals' Opinion. Conspiracy and monopolistic practices were again urged as the basis for treble damages, and preliminary and permanent injunctions were also sought. Once again the action was based on Sections 1 and 2 of the Sherman Act. The District Court consolidated Suit No. 1, which was still pending against National Screen, with Suit No. 2. All of the Petitioners filed motions for summary judgment, attaching the prior judgments in Suit No. 1, and urging res judicata and

---

[5] Pages 4-6 of the original brief filed by the Producers in the Court of Appeals details these supporting materials.

[6] The parties differed from Suit No. 1 as indicated at p. 3 and n. 4 *supra*.

collateral estoppel as barring Respondent's case. After hearing, judgment was entered on June 16, 1965 dismissing Suit No. 1 and Suit No. 2. Respondent did not appeal.

Suit No. 3 — 1967

As noted in the Court of Appeals' Opinion, Respondent "seemed to thrive" on adverse judgments,[7] and on August 11, 1967 Respondent filed this third action (Civil Action No. 67-1160) against Petitioners. This is the action — referred to as "Suit No. 3" — here involved. The District Court had jurisdiction over Suit No. 3 by virtue of Sections 4 and 16 of the Clayton Act.[8] The Complaint in Suit No. 3 is identical in substance with the complaints in Suit No. 1 and Suit No. 2, except that Respondent seeks damages only from the date of filing of Suit No. 2, *viz.*, November 30, 1964.

In summary, Respondent again charges in Suit No. 3 that National Screen's discontinuing dealing with it in 1961 was done in furtherance of Petitioners' conspiracy to restrain trade in the distribution of motion picture advertising accessories for the Producers' motion pictures — as a result of which Respondent claims it sustained losses since the date of filing of Suit No. 2 in the approximate amount of $250,000, before trebling.

As complete defenses to Suit No. 3, which is the subject of this Petition for Certiorari, Petitioners pleaded that the dismissals by summary judgment of the two prior actions in the same District Court barred maintenance of Suit No. 3 under the principles of res judicata and collateral estoppel.

After considering oral testimony by Respondent's

[7] Appendix, p. 32; 421 F.2d 1313, at p. 1316.
[8] 15 U.S.C. §§ 15, 26.

President at two hearings and in depositions, the District Court in one of those prior actions (Suit No. 1) concluded that, "[T]here is here no genuine issue of fact to be submitted upon trial."[9] On the basis of the prior judgments, the court entered judgment in favor of Petitioners in Suit No. 3.

The complete identity of Respondent's claims in all three suits was not only expressly conceded in Respondent's briefs in both Courts below but expressly confirmed in Chief Judge Brown's opinion for the Court of Appeals.[10] In this connection, Respondent conceded in its brief in the District Court:

> "It is true of course that plaintiff has had two prior suits dismissed by entry of adverse judgments, and *although those suits involved the same defendants and the same alleged unlawful conduct*, * * * this suit is different from those suits in that in this suit plaintiff's claim is to recover damages for injuries suffered during a period of time wholly subsequent to the time involved in the other suits."[11]

In its brief in the Court of Appeals Respondent reiterated:

> "The basic question is whether plaintiff is precluded by summary judgments entered against it in two prior cases (known in the court below as C.A. No. 11145 and C.A. No. 15125) commenced by the same plaintiff, against the same defendants, and *based primarily upon the same alleged unlawful contracts entered into by defendants during the period 1940-1947.*"[12]

---

[9] Civil Action No. 11,145, Judgment of June 16, 1965.
[10] 421 F.2d 1312, 1320, Appendix pp. 41-42.
[11] Original Brief for Exhibitors Poster Exchange, Inc. filed on April 19, 1968 in the District Court, p. 1. (Emphasis added.)
[12] Brief for Appellant in the Court of Appeals for the Fifth Circuit, filed December 3, 1968, p. 2. (Emphasis added.)

The Court of Appeals agreed that the claims in all three actions were based upon identical facts and recognized that:

> "It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen constituted an illegal conspiracy.
>
> • • •
>
> "It is equally clear, however, that the summary judgment in Suit No. 1 did not dispose of any issue regarding National Screen's attempt to monopolize. *But it was disposed of in Suit No. 2. This issue as well as National Screen's complicity in any conspiracy was necessarily* (sic.) *in Suit No. 2.*
>
> • • •
>
> "Thus, the Court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by depositions, pre-trial conferences, and other discovery devices *did not show* either monopolization, attempted monopolization, or conspiracy on the part of National Screen under §§ 1, 2 or both."[13]

Nevertheless, the Court of Appeals concluded that Respondent could attempt to prove damages occurring "subsequent to the cut-off date of Suit No. 2",[14] even though the alleged illegal activity relied on by Respondent had been ruled, on two prior occasions, insufficient to support Respondent's claims. It is this conclusion that Petitioners challenge.

This Statement of the Case would be incomplete with-

---

[13] 421 F.2d 1313, 1320. Appendix pp. 41-42. (Emphasis added.)
[14] *Id.* at p. 1321, Appendix p. 43.

out brief reference to the long history of litigation by various poster-renters throughout the United States against National Screen and the Producers, all of which has challenged the same allegedly unlawful conduct.

In all of the poster-renter cases listed below,[15] from 1949 to 1961, each of the poster-renter plaintiffs — through the same attorney[16] — asserted the same claims based upon the same allegedly unlawful exclusive licenses. Each of these cases terminated in favor of Petitioners.

---

[15](1) Lawlor v. National Screen Service Corporation, C.A. No. 10020 E.D. Pa., filed August 18, 1949.
(2) Lipp v. National Screen Service Corporation, C.A. No. 11136, E.D. Pa., filed June 30, 1950.
(3) Siegel v. National Screen Service Corporation, C.A. No. 11137, E.D. Pa., filed June 30, 1950.
(4) Schrader v. National Screen Service Corporation, C.A. No. 11138, E.D. Pa., filed June 30, 1950.
(5) Mitchel v. National Screen Service Corporation, C.A. 11376, E.D. Pa., filed September 14, 1950.
(6) Riff v. National Screen Service Corporation, C.A. No. 11597, E.D. Pa., filed November 15, 1950.
(7) Vogelstein v. National Screen Service Corporation, C.A. No. 11678, E.D. Pa., filed December 5, 1950.
(8) Lawlor v. National Screen Service Corporation, C.A. No. 22707, E.D. Pa., filed June 3, 1957.

The following appellate decisions involved the cases listed as (1)-(8) above:

Lawlor v. National Screen Service Corporation, 211 F.2d 934 (3rd Cir. 1954), rev'd, 349 U.S. 322 (1955). This appeal involved the case listed as number (1) above.

Lawlor v. National Screen Service Corporation, 238 F.2d 59 (3rd Cir. 1956), vacated, 352 U.S. 992 (1957). This appeal involved the cases listed above as (1), (3)-(8).

Lawlor v. National Screen Service Corporation, 270 F.2d 146 (3rd Cir. 1959, cert. denied, 362 U.S. 922 (1960). This appeal involved the case listed as (1) above.

Lipp v. National Screen Service Corporation, 290 F.2d 321 (3rd Cir. 1961), cert. denied, 368 U.S. 835 (1961). This appeal involved the cases listed as (2)-(8) above.

In addition, the first *Lawlor* case (number (1)) spawned three other excursions to this Court:

Lawlor v. National Screen Service Corporation, 350 U.S. 920 (1955). (Petition for certiorari dismissed on stipulation.)

Lawlor v. Honorable United States Court of Appeals for the Third Circuit, 351 U.S. 948 (1956). (Petition for leave to the file Petition for Mandamus denied.)

Lawlor v. National Screen Service Corporation, 359 U.S. 951 (1959). (Petition for certiorari dismissed on stipulation.)

[16] Mr. Francis Anderson was plaintiff's attorney in each of the cases listed above and in note 17 *infra*, except *Smith v. National Screen Service Corp.*

And, except for one, the cases since 1961,[17] which were also based on the same exclusive licenses and on the additional factor of National Screen's decision in May, 1961 to discontinue dealing with all poster-renter "jobbers", likewise terminated in favor of Petitioners.[18]

---

[17] (9) Vogelstein v. National Screen Service Corporation, C.A. No. 29526, E.D. Pa., filed April 21, 1961.
(10) Smith v. National Screen Service Corporation, C.A. No. 9274, W.D. Okla., filed May 8, 1961.
(11) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 11145, E.D. La., filed May 17, 1961.
(12) Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 7665, N.D. Ga., filed July 17, 1961.
(13) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 15135, E.D. La., filed November 30, 1964.
(14) Pantzer v. Paramount Film Distributing Corp., C.A. No. 67 Civ. 1401 E.D.N.Y., filed May 7, 1965, transferred by Judge Palmieri to the Eastern District of Pennsylvania on August 25, 1965, where it was given the docket No. 38330.
(15) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 67-1160, E.D. La., filed August 11, 1967.
(16) Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 12497, N.D. Ga., filed February 26, 1969.

The following appellate decisions involved the post-1960 cases listed above as (9)-(16).

National Screen Service Corp. v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962). This appeal involved the case listed as (12) above.

Vogelstein v. National Screen Service Corporation, 310 F.2d 788 (3rd Cir. 1962), cert. denied 374 U.S. 840 (1963). This appeal involved the case listed as (9) above.

Poster Exchange, Inc. v. Paramount Film Distributing Corp., 340 F.2d 220 (5th Cir. 1965), cert. denied, 381 U.S. 936 (1965). This appeal involved the case listed as (12) above.

National Screen Service Corp. v. Exhibitors Poster Exchange, Inc., 349 F.2d 891 (5th Cir. 1965). This appeal involved the case listed as (11) above.

Poster Exchange, Inc. v. National Screen Service Corporation, 362 F.2d 571 (5th Cir. 1966), cert. denied, 385 U.S. 948 (1966). This appeal involved the case listed as (12) above.

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 421 F.2d 1313 (5th Cir. 1970). This appeal involved the case listed as (15) above, and is the subject of this Petition for Certiorari.

Poster Exchange, Inc. v. National Screen Service Corporation, C.C.H. Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970). This appeal involved the case listed as (12) above.

[18] The *Pantzer* case, identified as (14) in note 17 *supra*, was dismissed for want of prosecution. The one exception referred to in the text is the *Poster Exchange* case, identified as (12), in which the Court of Appeals for the Fifth Circuit has affirmed a judgment, against National Screen only [Poster Exchange, Inc. v. National Screen Service Corporation, CCH Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970)] summary judgment in favor of the Producers in that case having been earlier affirmed in Poster Exchange, Inc. v. Paramount Film Distributing Corp., 340 F.2d 220 (5th Cir. 1965), cert. denied, 381 U.S. 936 (1965). National Screen is now preparing a Petition for Certiorari seeking review of that decision.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION INVOLVED IS IMPORTANT TO THE ADMINISTRATION OF JUSTICE.

In view of the undisputed fact that Respondent is relying for the *third* time on the same facts as to Petitioners' liability that have so far resulted in two adverse judgments of dismissal, this Court should grant certiorari to prevent further repetitive litigation in this and other similar cases in accordance with the established principle laid down by this Court in *Baltimore Steamship Co. v. Phillips*[19] and *Napa Valley Electric Co. v. Railroad Commission.*[20] And to the Petitioners herein, the Court of Appeals' reversal of the summary judgment dismissing Suit No. 8 means more than a violation of the legal principle of res judicata and a resulting additional burden on crowded court calendars. To them it means a continuation of the seemingly endless chain of poster-renter actions which the same attorney has kept alive since 1949 with the resultant huge expense and dislocation that such litigation entails.

No more cogent expression of the importance of the doctrine of res judicata can be found than that of this Court in *Baldwin v. Iowa State Traveling Men's Association.*[21]

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest;and *that matters once tried shall be considered for-*

---

[19] 274 U.S. 316 (1927).
[20] 251 U.S. 366 (1920).
[21] 283 U.S. 522, 525-526 (1931). (Emphasis added.)

> *ever settled as between the parties.* We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Certainly if the opinion of the Court of Appeals here is permitted to stand, the resulting erosion of the principle of res judicata will have far-reaching effects outside the Fifth Circuit. For if the opinion below stands, it will be an open invitation for disappointed litigants with groundless claims to rely on the device of finding new time periods for which to assert such claims over and over again in the expectation that they will eventually find a hospitable court.

The potential mischief in private antitrust litigation of the kind of procedure permitted by the court below can best be illustrated by reviewing the history of the poster-renter litigation itself. At least sixteen private actions have been filed against National Screen and the Producers by various poster-renters since 1949.[22] A number of the cases have been before this court,[23] some of them on more than one occasion.[24] The action permitted by the court below would revive claims by all of the losing plaintiffs in these cases who could allege new periods of damage following their earlier dismissals and under the reasoning below create new causes of action.

---

[22] Notes 15, 17, *supra*.
[23] *Ibid.*
[24] *Ibid.*

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS BY THIS COURT AND DECISIONS BY OTHER COURTS OF APPEALS.

The court below rested its decision on the proposition that:

> "[S]ignificant actions (or non actions) occurring subsequent to 1961, either alone or in combination with acts which have been completed prior to 1961 except for their consequences, may be the basis for new claims for damages traceable to such significant actions (or non actions).[25]

The proposition quoted, as does the entire Opinion below, ignores the procedural context of this case and the representations of all counsel that Suits 1, 2 and 3 rely on the same operative facts as to liability. The Opinion below urges Respondent to allege post 1961 acts as to liability. In so doing the court below either ignored Rule 56(e) of the Federal Rules of Civil Procedure, or, without directly admitting that it was doing so, relied upon Respondent's different-damage-period theory of the case.

A. *The Motion for Summary Judgment Required Respondent to Assert Any "New Actions."*

Respondent did not assert "actions (or non actions)" occurring after 1961 in its complaint, in its affidavits in opposition to the motions for summary judgment or in its many briefs in the District Court and in the Court of Appeals. Respondent did not do so, and did not request the Court of Appeals to allow it to do so, because there are no such "actions or non actions".

---

[25] Appendix, pp. 37-38, 421 F.2d at p. 1318.

The affidavit of William H. Cobb, the President and sole shareholder of the Respondent, filed in opposition to the motions for summary judgment sets forth the basis of Respondent's claim. This affidavit relates entirely to the so-called illegal license agreements between the Producers and National Screen which were made between 1940 and 1947. Respondent's opposing papers did not contradict the main thrust of the moving papers of the Petitioners which is that the alleged illegal activity here asserted is the same as that previously asserted. They confirmed it. Under the plain meaning of Rule 56(e) of the Federal Rules of Civil Procedure, Respondent was required to "set forth the specific facts showing that there is a genuine issue for trial." The District Court properly applied the second provision of that rule that "summary judgment . . . shall be entered"[26] against a party that "does not so respond",[27] because as even the Court of Appeals agreed, the legality, *vel non*, of the exclusive license agreements was no longer open to question by Respondent.[28]

B. *A New Damage Period Does Not Create a New Cause of Action.*

Respondent's sole reliance below was on the bare proposition that Suit No. 3 relates to a new time period growing out of an abatable wrong and, therefore, amounts to a new cause of action.

Respondent's theory is based on its uniquely distorted reading of this Court's opinion in *Lawlor v. National*

---

[26] Rule 56(e), Federal Rules of Civil Procedure.
[27] *Ibid.*
[28] Appendix, pp. 41-42, 421 F.2d at p. 1320.

Screen Service Corp.[29] Respondent argued to the Court of Appeals as follows:

> "[M]ore fully, defendants [here Petitioners] seem to consider it preposterous for one to say that it is possible, under the law, for a plaintiff to start a suit, lose it, on the merits, by entry of a formal judgment of dismissal on the merits, take no appeal, and then, years later, start a second suit directed against the same defendants *and based primarily on the same alleged unlawful conduct.*
>
> "And yet that can be done according to Lawlor — as plaintiff [here Respondent] reads Lawlor."[30]

This reading of *Lawlor* ignores all of the differences between the prior and subsequent suits in *Lawlor* on which this Court there relied. The subsequent suit in *Lawlor* alleged a substantial change in the scope of National Screen's monopoly;[31] the subsequent suit in *Lawlor* involved five new producer defendants;[32] the prior "judgment" relied on in *Lawlor* was entered as part of a compromise between the parties;[33] and the subsequent suit in *Lawlor involved substantial new antitrust violations* occurring after the termination of the earlier suit.[34] None of those differences is present here. This case does not resemble *Lawlor* since here there is no meaningful change of parties between Suits No. 1 and 2 and Suit No. 3; the Respondent neither alleges nor relies on any

---

[29] 349 U.S. 322 (1955).
[30] *Reply Brief On Behalf of Appellant Exhibitors Poster Exchange, Inc.*, filed in the Court of Appeals on March 7, 1969, p. 2.
[31] 349 U.S. at p. 328.
[32] *Id.* at p. 329.
[33] *Id.* at p. 324.
[34] *Id.* at p. 328.

new illegal conduct; there are no allegations suggesting an expanded scope of the asserted monopoly; and, the prior judgments did not result from a compromise.

Whether Respondent's reading of *Lawlor* was accepted by the Court of Appeals is unclear in its Opinion. In rejecting Petitioners' view that Suit No. 3 asserts the same cause of action relied on in the earlier cases, Chief Judge Brown's Opinion pointed to "significant actions (or non actions) occurring subsequent to 1961" as a potential "basis for new claims for damages traceable to such significant actions (or non actions)"[35] — thus suggesting agreement with Petitioners' reading of *Lawlor* as holding that the later suit was based on a new cause of action only because of factors in addition to the mere difference in the damage period.

But if that was, indeed, the holding below, the holding conflicts with *Lawlor* because, as we have already demonstrated, there are no additional factors here.

On the other hand, the Court of Appeals held that the record supports a potential new cause of action — in spite of Respondent's admission that there is nothing new. The decision below would thus appear to accept Respondent's argument that each new time period provides a new cause of action even though there is no change in the operative facts. If so, it is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Engelhardt v. Bell & Howell Co.*,[36] the only decision by a court of appeals which has involved the question whether *Lawlor's* finding of a new cause of action rested solely on the mere difference in time

---

[35] Appendix, pp. 37-38, 421 F.2d at p. 1318.
[36] 327 F.2d 30 (1964).

period.[37] The court in that case expressly rejected the argument which Respondent relies on here, holding that the antitrust case before it did not involve a new cause of action and was properly dismissed as barred by res judicata:

> "Lawlor v. National Screen Service Corp., . . . relied upon by the plaintiff, is readily distinguishable factually from our present case. In Lawlor five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged. *In our present case the parties in all actions are identical and only continuing violations of the type involved in the prior actions and there adjudicated against the plaintiff are asserted.*"[38]

Since *Lawlor* is clearly distinguishable, the conflict of the decision below with a case prior to *Lawlor* in the Second Circuit *(Straus v. American Publishers' Ass'n)*,[39] is also meaningful for purposes of this Petition.

If construed as having embraced Respondent's analysis of *Lawlor*, the Opinion below would appear to be in accord with the view of the Sixth Circuit in *Cream Top Creamery v. Dean Milk Co.*[40] A clear conflict among the circuits is thus apparent and the confusion in applica-

---

[37] *Id.* at pp. 35-36.
[38] *Ibid.* (Emphasis added.)
[39] 201 F. 306, 310 (2d Cir., 1912).
[40] 383 F.2d 358 (6th Cir. 1967). In a distinguishable factual context *Cream Top Creamery* is arguably contrary to *Englehardt*, *supra* notes 36-38. Snyder v. Riddell, 252 F.2d 23 (9th Cir. 1958), involving the application of res judicata in federal income tax litigation and presenting a problem resolved by this court in Flora v. United States, 357 U.S. 63 (1958), would also appear contrary to *Englehardt*. The pending petition for certiorari in Miller-Davis Co. v. Premiere Electrical Conctrustion Co., No. 374 October Term 1970, another antitrust suit with a res judicata issue, involves a question different from the one here.

tion of this Court's decision in *Lawlor* is graphically illustrated by the Opinion below. This Court should grant certiorari to clarify *Lawlor's* meaning and to resolve its conflicting interpretations by the Courts of Appeals.

The decision by the Court of Appeals here was wrong in another respect. There was no occasion for the court to reach the question of collateral estoppel, but when it did so it erred again. The court correctly concluded that it was "beyond doubt that Suit No. 1 disposed of the issue of whether the activities of the Producers and National Screen in 1961 constituted an illegal conspiracy,"[41] that Suit No. 2 disposed of the issue of National Screen's attempt to monopolize and that Respondent was, therefore, collaterally estopped on all issues arising out of facts which existed as of 1961. But the court felt that, "Left open, however, are actions, if any, which may be established by proof covering post 1961 activities (or non actions)."[42] Even this determination is in direct conflict with the decision in *Florasynth Laboratories v. Goldberg*[43] by the Seventh Circuit. Since this record conclusively establishes that there are no such "activities (or non actions)," even collateral estoppel compels affirmance of the District Court's decision granting summary judgment in favor of Petitioners.

---

[41] Appendix, pp. 41-42, 421 F.2d at p. 1320.
[42] *Id.* at p. 43, and p. 1321.
[43] 191 F.2d 877 (1951).

CONCLUSION

For all of the foregoing reasons, Petitioners herein respectfully urge that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

BERNARD G. SEGAL and
EDWARD W. MULLINIX,
Schnader, Harrison, Segal & Lewis
1719 Packard Bldg.
Philadelphia, Pa. 19102

LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin, Krim & Ballon
477 Madison Ave.
New York, New York 10022

GIBBONS BURKE
Chaffe, McCall, Phillips, Burke, Toler & Sarpy
National Bank of Commerce Bldg.
New Orleans, Louisiana 70112
Attorneys for National Screen Service Corporation, Petitioner.

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN, and
WILLIAM D. TREEBY,
Stone, Pigman, Walther, Wittmann & Hutchinson
1200 Whitney Bank Building
New Orleans, Louisiana 70130
Attorneys for Columbia Pictures Corp.
Metro-Goldwyn-Mayer, Inc.,
Paramount Film Distributing Corp.,
Twentieth Century-Fox Film Corp.
United Artists Corporation,
Universal Film Exchanges, Inc.
and Warner Bros. Pictures Distributing Corp., Petitioners.

September 28, 1970

APPENDIX

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

Minute Entry Mitchell, J. June 21, 1968

This cause came on for hearing on another day on motion of the defendants, National Screen Service Corporation, Columbia Pictures Corporation, Metro Goldwyn Mayer, Inc., RKO Radio Pictures, Inc., Twentieth Cent-

ury Fox Distributing Corporation, United Artists Corporation, Universal Film Exchange, Inc. and Warner Bros. Pictures Distributing Corporation, for a summary judgment.

Present:

C. Ellis Henican, Jr., Esq.
Francis T. Anderson, Esq.
Glen B. Hester, Esq.
Attorneys for plaintiff
Philip A. Whittmann, (sic.) Esq.
William D. Treeby, Esq.
Attorneys for defendants

IT IS ORDERED that the motion of the defendants for summary judgment be, and it is, hereby granted upon the grounds of res judicata based upon the judgment of this Court in Civil Action 15125.

James G. Burke, Jr.

s/ L. L. M.

ORDER AMENDING MINUTE ENTRY OF JUNE 21, 1968

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

Minute Entry Mitchell, J. June 28, 1968

IT IS ORDERED that the Court's Minute Entry of June 21, 1968, be, and it is, hereby amended as follows:

Present:

E. Ellis Henican, Jr., Esq.

Francis T. Anderson, Esq.

Glen B. Hester, Esq.

Attorneys for plaintiff

Phillip A. Wittmann, Esq.

William D. Treeby, Esq.

Attorneys for Columbia Pictures Corp., Metro Goldwyn Mayer, Inc., Paramount Pictures Dist. Corp., United Artists Corp., Universal Film Exchanges, Inc. and Warner Bros. Pictures Dist. Corp.

Gibbons Burke, Esq.

Walter S. Beck, Esq.

Attorneys for National Screen Service Corp.

s/ L. L. M.

DISTRICT COURT SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

(Filed: July 8, 1968)

This matter came on for hearing on another day on motion for summary judgment filed by National Screen Service Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Ex-

changes, Inc., and Warner Bros. Pictures Distributing Corporation. The motion for summary judgment of the above-named defendants, having heretofore been granted on June 21, 1968, and the Court hereby expressly determining that there is no just reason for delay and expressly directing the entry of a final judgment in favor of defendants, National Screen Service Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation, pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED, ADJUDGED AND DECREED that the order entered herein on June 21, 1968 granting the motions for summary judgment in favor of the above-named defendants be and it is hereby made a final judgment of this Court, reserving to National Screen Service Corporation the right to pursue its counterclaim against the plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff, Exhibitors Poster Exchange, Inc., be and the same is hereby dismissed with prejudice as to the defendants, to-wit: National Screen Service Corporation, Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Exhibitors Poster Exchange, Inc., shall pay all costs and charges incurred by each of the defendants in these proceedings.

s/ Lansing L. Mitchell
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

July 8, 1968

ORDER AMENDING MINUTE ENTRY OF JUNE 21, 1968

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.

Plaintiff

versus

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION

Defendants

Minute Entry Mitchell, J. July 8, 1968

IT IS ORDERED that the Court's Minute Entry of June 21, 1968, be, and it is, hereby amended as follows:

To add Paramount Film Distributing Corporation as a defendant dismissed by this order.

s/ L. L. M.

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1968
NO. 26643
D. C. Docket No. Civ. 67-1160 "F"

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

"Per Brown, Chief Judge"
1/26/70

COURT OF APPEALS OPINION

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,
v.
NATIONAL SCREEN SERVICE CORPORATION
et al., Defendants-Appellees.
No. 26643.
United States Court of Appeals,
Fifth Circuit.
[421 F.2d 1313]

* * *

[p. 1314]

Before JOHN R. BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

JOHN R. BROWN, Chief Judge:

Here Exhibitors[1] is seeking reversal of the District Court's summary judgment in favor of the defendants. The District Court granted the summary judgment on the basis of the doctrines of res judicata and collateral estoppel, which doctrines are the natural points of dispute of such long continuing private anti-trust cases as this.

Exhibitors is a jobber or rental distributor of advertising posters for movies. There are two defendants. As a group the first — Producers — comprises the major movie companies,[2] which through their copyright rights

[1] Exhibitors Poster Exchange, Inc.

[2] The movie companies that are defendants in the present action are Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, 20th Century-Fox Film Corporation, United Artist Corporation, Universal Film Exchanges, Inc., and Warner Brothers Pictures Distributing Corporation.

have the sole right to produce or license the production of the advertising material for their movies. The second, and perhaps most direct, is National Screen.[3] Its economic role is a dual one (i) as the only major holder of a license to produce this material and (ii) a distributor of the material to motion picture exhibitors.

The history of the movie poster industry has been a history of almost continuous antitrust litigation since[4]

[p. 1315]

the early 1940s when the movie companies quit producing their own posters and started giving this right to National Screen. This litigation was produced when National Screen took steps toward vertically integrating its operation by supplying movie exhibitors directly thus eliminating the jobbers such as Exhibitors. National Screen at first did not persist in these efforts. When antitrust claims were brought it would enter into consent judgments under which it agreed to supply the jobbers with the posters it produced under the license from Producers. See Lawlor v. National Screen Service, 3 Cir., 1959, 270 F.2d 146; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647.

In spite of the consent judgments, several jobbers in

---

[3] National Screen Service Corporation.

[4] The most complete history of this industry is set out in Lawlor v. National Screen Service Corp., 3 Cir., 1959, 270 F.2d 146, cert. denied, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742. See also Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122; Vogelstein v. National Screen Service Corp., E.D.Pa., 1962, 204 F.Supp. 591; Lipp v. National Screen Service Corp., E.D.Pa., 1960, 188 F.Supp. 245; Poster Exchange, Inc. v. National Screen Service Corp., N.D.Ga., 1963, 35 F.R.D. 558, aff'd, 5 Cir., [illegible] F.2d 320; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647.

the Philadelphia area brought another antitrust case alleging conspiracy and monopolistic practices. See Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122. Despite a momentary victory in the Supreme Court, which eliminated obstacles to a further factual inquiry, the tactic proved to be a mistake when, after the case was finally decided on the merits, the Third Circuit held that neither the licensing agreements nor the practices of National Screen were illegal. Lawlor v. National Screen Service Corp., 3 Cir., 1959, 270 F.2d 146, cert. denied, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742.

Armed now with *stare decisis*, National Screen in 1961 executed its plan to put the vertical integration into effect. That included the February notice to jobbers all over the country that it would no longer operate through middle men.

Undaunted by the Third Circuit's opinion, jobbers again brought suit. Exhibitors was no exception. On May 17, 1961, one day after the date on which National Screen was to cease supplying posters, Exhibitors brought suit in the United States District Court for the Eastern District of Louisiana against National Screen and eight Producers.[5] This became Suit No. 1.

Exhibitors alleged that the refusal of Producers to license Exhibitors to produce posters on a local basis was a "group boycott". Thus it alleged that National Screen

[5] With the exception of Columbia Picture Corporation all of the movie-company defendants in the present action were also defendants in the 1961 action.

and Producers were violating Sections 1[6] and 2[7] of the Sherman Act in that they were engaged in a "contract or conspiracy in restraint of trade" and were conspiring to give National Screen a monopoly and that National Screen was monopolizing or attempting to monopolize the industry. Exhibitors sought triple damages under the private-attorney-general authority given by § 15 of the Clayton Act[8] and sought to enjoin the defendant from engaging in the alleged illegal conduct in the future.

[p. 1316]

Exhibitors was granted a preliminary injunction against all parties. But, after the depositions of Exhibitors' President, and National Screen's local manager were taken and upon motion and affidavits of officials of Producers, the Court granted a summary judgment in favor of Producers and dissolved the injunction. National Screen was, however, retained as a party defendant.

In 1964, after a pre-trial conference and as the trial with only National Screen as a defendant neared, Exhibitors filed Suit No. 2 in the same court. In Suit No. 2 the Producers[9] were again named defendants and Exhibitors again stated the same facts — the 1961 refusal to deal — but sought only to recover the damages suf-

---

6 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be *illegal* * * *." 15 U.S.C.A. § 1.

7 "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C.A. § 2.

8 15 U.S.C.A. § 15. In Suit No. 1 Exhibitors sought $300,000 in damages.

9 In Suit No. 2 Columbia Pictures Corp. was a defendant.

fered since the summary judgment in Suit No. 1. The trial on the remaining part of Suit No. 1 was postponed and the two suits were merged. All defendants — National Screen and Producers — moved for summary judgment and the Court granted all the motions. As in Suit No. 1 no appeal was taken.

Exhibitors was undaunted. Adverse judgments were the fuel on which it seemed to thrive. And in 1967 the present Suit, No. 3, was instituted against the same defendants in which Exhibitors asked for damages from the time of filing Suit No. 2. Again all defendants moved for summary judgment and the District Court by invoking the doctrines of res judicata and collateral estoppel undertook to lay the antitrust claims of this jobber to rest.[10]

[1] The defendants pressed these doctrines on the District Court as though they were to be used as clubs to accomplish the policy embedded in them: the prevention of a repetitive litigation. The doctrines must be used, however, not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation. In addition, it must be remembered that the use of these doctrines can cloak a party in perpetual immunity and thus possibly protect conduct lasting long past the prior judgment — conduct that the law may grow to abhor.

Our attempt to carve our way through these doctrines and this litigation convinces us that the District Court erred. Although res judicata and collateral estoppel do

[10] Other jobbers have also been persistent in their claims. See The Poster Exchange, Inc. v. National Screen Service Corp., N.D.Ga., 1969, 306 F.Supp. 491.

slice away much, there are still controverted issues upon which Exhibitors may recover if it can meet its considerable burden of proof.

I.

[2, 3] Res judicata must first be dealt with. It is only where the prior judgment does not fit into that doctrine that there need be inquiry into the collateral estoppel effect of such judgment. Of course, the doctrine is that "a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." Lawlor v. National Screen Service Corp. 1955, 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122, 1127.

Here there is no problem with the identity of the parties. The problem is whether the present action — Suit No. 3 — is "based on the same cause of action" as either Suits No. 1 or No. 2. The answer here depends on the nature of the right of action granted under the antitrust laws. It is Exhibitors' contention that the alleged wrongs — the § 1 conspiracy in restraint of trade, and the § 2 conspiracy to monopolize, and monopolization — are, if not a series of new torts successively perpetrated, at least in the nature of continuing torts. It argues that there is no res judicata effect to either judgment because each new accrual of damage gives rise to a new claim for which relief can be granted —

[p. 1317]

that the damages occurring since Suit No. 2 have given rise to a new cause of action.

The defendants, on the other hand, argue that there is and has been only one cause of action — the alleged concerted refusal in 1961 of the National Screen and Producers to deal with Exhibitors. They contend that there has been prior adjudication that that conduct is not in violation of either § 1 or § 2 of the Sherman Act (see notes 6 and 7 *supra*).

Exhibitors relies upon the Supreme Court's 1955 decision in Lawlor v. National Screen Service Corp., *supra*, a case involving National Screen's earlier attempt to eliminate jobbers. There National Screen and the movie companies argued that a 1942 consent judgment under which National Screen agreed to supply advertising material to jobbers was res judicata. The jobbers, however, there alleged that since the entry of the prior judgment National Screen had engaged in new monopolistic practices — deliberately slow deliveries, tie-in sales, and others — and that five other producers had joined the conspiracy.

The Supreme Court held that the prior judgment was not a bar. The Court held that the additional claims coupled with the fact that in those circumstances the continuing conduct gave rise to more than one cause of action. [sic.] The Court said:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct — for example, an abatable nuisance — may frequently give rise to more than a single cause of action. And so it is here. The conduct frequently complained of was all subsequent to the 1943 judgment. In addition,

there are new antitrust violations alleged here — deliberately show [sic.] deliveries and tie-in sales, among others — not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories had increased to nearly 100%. Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment does not constitute a bar to the instant suit."

At 349 U.S. 328, 75 S.Ct. 868-869, 99 L.Ed. 1127-1128.

Defendants argue that *Lawlor* is not controlling because of the subsequent, independent new antitrust violations alleged there. They find support for this distinction in Englehardt v. Bell & Howell Co., 8 Cir., 1964, 327 F.2d 30, 36. They also point to the decision of this Court in Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 5 Cir., 1961, 295 F.2d 362 where we held that an antitrust claim was barred by the doctrine of res judicata since the same fact situation had been the basis for an unsuccessful action based upon breach of a contract to deal. But see, International Rys. of Central America v. United Fruit Co., 2 Cir., 1967, 373 F.2d 408, 419, cert. denied, 1967, 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed.2d 975.

National Screen and Producers also argue that the definition of a cause of action for purposes of determining whether the statute of limitations has run is the same one that should be used here for determining if res judicata is applicable. It is clear that for Statute of Limitations purposes the courts have held that a claim under the antitrust acts is not in the nature of a continuing tort or a nuisance. For that purpose the cause of action is said to arise "from the commission of the last overt act causing injury or damage." *Garelick v.*

[p. 1318]

Goerlich's Inc., 6 Cir., 1963, 323 F.2d 854[11]

[4] These statute of limitation cases do not compel the result urged on us here. "The determination of the meaning of 'cause of action' for purposes of deciding whether or not a person has slept on his rights is of little aid in deciding whether a prior judgment is a bar to the present action." Williamson v. Columbia Gas & Electric Corp., 3 Cir., 1950, 186 F.2d 464, 469. There the concern is about preventing the presentation of stale claims: Here the concern is with preventing repetitive litigation while preserving the opportunity to be heard and insuring that the policy of the antitrust acts are carried out.

Neither *Englehardt, supra* nor *Norman Tobacco &*

[11] For other cases reaching this same result see Baldwin v. Leow's Inc. 7 Cir., 1963, 312 F.2d 387; Steiner v. 20th Century-Fox Film Corp., 9 Cir., 1956, 232 F.2d 190; Crummer Co. v. DuPont, 5 Cir., 1955, 223 F.2d 238, cert. denied, 1956, 350 U.S. 848, 76 S.Ct. 85, 100 L.Ed. 755; Momand v. Universal Film Exchanges, 1 Cir., 1948, 172 F.2d 37, cert. denied, 1949, 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118; Schenley Inds., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, D.N.J., 1967, 272 F.Supp. 872; Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., S.D.N.Y., 1961, 193 F.Supp. 401; Molinas v. National Basketball Ass'n, S.D.N.Y., 190 F.Supp. 241; Fleischer v. A. A. P., Inc., S.D.N.Y., 1959, 180 F.Supp. 717. For cases taking a somewhat different approach see DeLaughter v. Borden Co., 5 Cir., 1966, 364 F.2d 624, 629-630; Delta Theatres, Inc. v. Paramount Pictures, Inc., E.D.La., 1968, 158 F.Supp. 644, 649.

Candy Co., supra is decisive. In *Englehardt*, although the Court found it necessary to distinguish *Lawlor*, the cases were substantially different. In *Englehardt* there was a single breach of a contract. There was one and only one refusal to deal and only one transaction. Likewise in *Norman Tobacco & Candy Co.*, where the first suit was tried on a breach of contract theory, there was one and only one transaction — essentially a prospective buyer's effort to procure and the seller's refusal to deal. In effect it was the claim that at a time certain the defendant did an illegal act which caused damages (i) between that date and the filing of the suit and (ii) since the fil'ng of the suit down to the present and (iii) in the future.

But the statute of limitation cases do not reach situations in which the damages come — or are alleged to come — not from a prior act or series of acts which have been completed except in their consequences, but rather from actions (or non actions) subsequently occurring, either alone or in combination with the "completed" actions. Unless the statute of limitation cases are confined to the former situation a policy of repose is transmuted into an unexpected and wholly gratuitous notion of perpetual immunity. As *Lawlor* warns, it is imperative that we not "confer [these defendants] * * * immunity from civil liability for future violations." Lawlor, *supra*, at 349 U.S. 329, 75 S.Ct. 869, 99 L.Ed. 1128.

[5] In light of these policies we must hold that significant actions (or non actions) occurring subsequent to 1961, either alone or in combination with acts which have been completed prior to 1961 except for their consequences, may be the basis for new claims for damages

traceable to such significant actions (or non actions). In that situation the harm that is claimed in Suit No. 3 is not that arising out of the particularized activities resolved in Suit No. 1 or No. 2. Old claims, then, are not being reasserted. A new claim has been alleged. Whether the new claim thus stated is one which under our federal rules is a claim upon which relief can be granted is a matter of substantive antitrust law, considered in the light of the *stare decisis* effect of the cases, and not a matter of res judicata or estoppel by judgment.

[6] When the pleadings in the present case are given that liberal reading called for by Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, and its progeny, see e. g. Pred v. Bd. of Public Instruction, 5 Cir., 1969, 415 F.2d 851, the District Court may conclude

[p. 1319]

that they adequately allege that there has been new illegal conduct, not merely continuing damages from old, and now insulated, illegal conduct, in violation of the antitrust laws and therefore stating a claim upon which relief can be granted. Such a claim would be a new cause of action — No. 3 would not be No. 1 nor No. 2.

II.

[7] Although No. 3 would be a new cause of action and res judicata inapplicable thereto, Exhibitors might still be barred from further action on certain issues by collateral estoppel. The doctrine is classically stated by Mr. Justice Field in Cromwell v. County of Sac, 1877, 94 U.S. 351, 24 L.Ed. 195 when he says that in "a second action between the same parties * * * upon a different

claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." at 94 U.S. 353, 24 L.Ed. 198. It forecloses inquiry only as to those issues which were necessarily determined. United States v. Burch, 5 Cir., 1961, 294 F.2d 1, 5.

[8] Thus it is necessary to determine what were the "matters in issue or points controverted" in Suits No. 1 and No. 2. This determination is to be made on the basis of the prior records. The process was generally described by Mr. Justice Day: "To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy." United Shoe Machinery Corp. v. United States, 1922, 258 U.S. 451, 459, 42 S.Ct. 363, 366, 66 L.Ed. 708, 718.

[9] We reject out of hand the beguiling but superficial contention of Exhibitors that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.

It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence — plaintiff's, defendant's, or all — of a directed verdict. Indeed, a

more positive adjudication is hard to imagine.[12] It is determination that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). And it most certainly encompasses ultimate facts of the kind here involved. The only enigma involved is determining which of one or more multiply [sic.] decisive issues of fact the Court on summary judgment determined was totally lacking in legal significance. If a claim requires elements 1, 2 and 3 for recovery, summary judgment is proper if 2 is missing. But this would not give to a summary judgment based thereon a perpetual cloak to forbid inquiry into 1 or 3, or both. This would distort the wholesome policy behind collateral estoppel. As with many other wonderful tools to cope with today's exploding demands on judicial energy, care must be used by Trial Judges in reflecting the basis for their action. Thus while it is true that we and others often point out that so-called findings of fact are superfluous (if non-existent) in a summary judgment,[13] this is a long way from saying that Trial Judges should not excise the issue or issues determined to be without

[p. 1320]

genuine controversy. On the contrary everything in the rules and good administration calls for an articulate reflection of the basis for the Judge's ruling. Had that been done as to Suit No. 1, and again as to Suit No. 2, our task would have been greatly simplified.

---

[12] For cases giving collateral estoppel effect to summary judgments see Hyman v. Regenstein, 5 Cir., 1958, 258 F.2d 502, 510, cert. denied, 1959, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575; Wolcott v. Hutchins, S.D.N.Y., 1968, 280 F.Supp. 559, 563.

[13] See Hindes v. United States, 5 Cir., 1964, 326 F.2d 150, 152; United States for Use and Benefit of Industrial Instrument Corp. v. Paul Hardeman, Inc., 5 Cir., 1963, 320 F.2d 115, 116; Shehi v. Southwestern Bell Tel. Co., 10 Cir., 1967, 382 F.2d 627, 629.

But now that this is an enigma wrapped in a mystery we must follow Mr. Justice Day's instruction, United Shoe Machinery Corp., *supra*, and look to the records in Suits No. 1 and No. 2 to determine which issues were necessarily decided. The issues presented by the complaint are (1) whether the 1961 refusal to deal was the product of a conspiracy in restraint of trade between National Screen and Producers forbidden by § 1 of the Act and (2) whether under § 2 National Screen monopolized or attempted to monopolize the industry by the actions in 1961.

It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen in 1961 constituted an illegal conspiracy.[14] Except for identification of each Producer the motions for summary judgment were identical. "The above Depositions, Transcript and Letter show conclusively that Defendant [name of movie company] has never conspired to give Defendant National Screen Service Corporation a monopoly in the manufacture and distribution of motion picture advertising posters in the New Orleans area and show, on the contrary, that Defendant has at all times indicated its willingness to deal with the plaintiff, Exhibitors Poster Exchange, Inc." Whether rightly or wrongly, these facts (or legal facts) were accepted by the Trial Court. This was the only basis for the motions and this issue was thus necessarily disposed of by the court's summary judgment. We would emphasize, however, that this relates to 1961 conduct, not subsequent conduct within the reach of the complaint in Suit No. 3.

---

[14] We have obtained from the District Court the complete record in Suits No. 1 and No. 2 as well as the present case. This painstaking examination, page by page, brief by brief, was one really for the Trial Court, and more accurately, for counsel.

It is equally clear, however, that the summary judgment in Suit No. 1 did not dispose of any issue regarding National Screen's attempt to monopolize. But it was disposed of in Suit No. 2. This issue as well as National Screen's complicity in any conspiracy was necessarily [sic.] in Suit No. 2. National Screen submitted two motions asking for relief. The first was filed on Dec. 14, 1964 before the remaining part of Suit No. 1 was merged with Suit No. 2. The second was filed on Jan. 29, 1965 after the merger. The first is entitled a motion for summary judgment and the second is entitled a motion for dismissal on the pleadings. Each motion was supported by memorandum. The theme of both is that there should be judgment for National Screen on both the § 1 issue of conspiracy and the § 2 issue of monopolization since other courts in other cases had held that on the basis of similar allegations there was no illegal conduct.

The Court granted National Screen the relief sought and gave two reasons. First the Court believed that the doctrine of res judicata was applicable. The court gave a second reason, however. The court relied on the decision of the United States District Court for the Northern District of Georgia to find that the *Lawlor* decision by the Third Circuit was controlling on the question of the legality of National Screen's conduct. Thus the court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by deposition, pretrial conferences, and other discovery devices did not show either monopolization, attempted monopolization, or conspiracy on the part of National Screen under §§ 1, 2 or both. But

[p. 1321]

all was with respect to actions done or not done in 1961.

[10] The effect of the order in Suit No. 1 and the order in Suit No. 2 is to wipe out all claims against Producers as well as National Screen arising out of actions (or non actions) of 1961, and in so far as Suit No. 3 might have expanded these actions, for damages encompassed by Suit No. 2.[15] Left open, however, are actions, if any, which may be established by proof covering post 1961 activities (or non actions) which substantively are violations of the antitrust laws and the resulting damages therefrom occurring subsequent to the cut off date of Suit No. 2.

The burden may be a heavy one, but Exhibitors is entitled to attempt to bear it. We thus must remand the case to the District Court. We do so, however, without even the slightest murmur of a suggestion as to how it will or should come out. Pred v. Board of Public Inst., 5 Cir., 1969, 415 F.2d 851, 860.

Reversed and remanded.

---

[15] It should be emphasized that in disposing of Suit No. 2 the Trial Court considered that it was all 1961 activity which gave rise to the claim of § 1 conspiracy or § 2 monopolization. It did not undertake to view Suit No. 2 in the way we look on Suit No. 3 as alleging something new and beyond Suit No. 1. Hence, on the inquiry of what was necessarily determined in Suit No. 2 we accept the Trial Court's reading of the complaint as a claim arising out of 1961 actions with damages resulting in 1964 on.

COURT OF APPEALS
ORDER DENYING REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 26643

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(June 29, 1970)

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.